

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 6, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1890-CR**

**Cir. Ct. No. 2013CT120**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MICHAEL J. ADRIAN, JR.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Rock County:  
RICHARD T. WERNER, Judge. *Reversed.*

¶1 SHERMAN, J.<sup>1</sup> The State of Wisconsin appeals an order of the circuit court granting Michael Adrian's motion to suppress evidence, which was granted on the basis that the evidence was obtained following an unlawful arrest.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The State contends that the transportation of Adrian to the nearest police station for the purpose of performing field sobriety tests did not convert a lawful *Terry*<sup>2</sup> detention into an illegal custodial arrest. I agree and therefore reverse.

### BACKGROUND

¶2 The following facts are taken from the hearing on Adrian’s motion to suppress and are not in dispute. On February 3, 2013, Janesville Police Officer Shawn Welte conducted a traffic stop of Adrian’s vehicle. Officer Welte testified that the weather conditions at the time of the stop were “bad” and that “[i]t was very cold, very windy ... [and] icy out.” Officer Welte further testified that “[t]he sidewalk wasn’t shoveled, and the streets were kind of slushy,” and that there was not a clear place for Adrian to conduct field sobriety tests. Officer Welte testified that he didn’t believe that it would have been fair or safe for Adrian to perform field sobriety tests at the location of the stop, so Officer Welte patted Adrian down and transported him in the backseat of his squad car, which had locked doors preventing Adrian from exiting the vehicle without assistance from Officer Welte, to the police department to perform the testing. Officer Welte testified the station was located approximately one and one-half blocks from the scene of the traffic stop and took less than one minute to transport Adrian. Officer Welte testified that he parked his squad car inside the police station’s “sally port,” which he described as a “big garage.” Officer Welte testified that Adrian would not have been able to leave the sally port without Officer Welte’s assistance. Officer Welte further testified that he informed Adrian that if Adrian passed the field sobriety test, Adrian would be transported back to his vehicle.

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<sup>2</sup> See *Terry v. Ohio*, 392 Wis. 2d 1 (1968).

¶3 Adrian was later arrested and charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration, both as second offenses. Adrian filed a motion to suppress evidence based on an illegal arrest resulting from being transported to the police station from the scene of the traffic stop. Following a motion hearing, the circuit court granted Adrian's motion. The court determined that under the totality of the circumstances—being patted down, placed in a locked squad car and taken to the police station's sally port where he was not free to leave, a reasonable person in Adrian's position would have believed himself or herself to be in custody. The State appeals.

### DISCUSSION

¶4 The limited issue presented in this case is whether Adrian was illegally arrested when he was transported from the scene of the traffic stop to the police station.

¶5 When reviewing a motion to suppress evidence, we will uphold the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). However, we independently determine whether those facts satisfy the applicable constitutional provisions. *See State v. Quartana*, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997).

¶6 A temporary stop following a traffic stop constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution, and implicates the constitutional protections against unreasonable searches and seizures. *Sate v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Under *Terry*, a police officer may, under proper circumstances, temporarily detain a person in the absence of

probable cause to arrest for the purpose of investigating possible criminal activity. *Terry*, 392 U.S. at 22.

¶7 Under certain circumstances, a person who is detained under a *Terry* investigation may be moved “in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest.” *Quartana*, 213 Wis. 2d at 446. To determine whether the transport of a person temporarily detained under *Terry* to a different location converts the temporary seizure into an arrest, we conduct a two-part inquiry: (1) was the person moved within the “vicinity”; and (2) was the purpose in moving the person reasonable. *Id.*

¶8 The State argues that Adrian was transported within the “vicinity” of the traffic stop. Adrian does not dispute this and I agree. This court concluded in *Quartana* that transporting a defendant one mile fell within the definition of “vicinity,” which the court defined as the “surrounding area or district” or “locality.” *Id.* at 446-47. In this case, Adrian was transported less than two blocks, well within the surrounding area or locality of where the stop took place.

¶9 The State also argues that the purpose of moving Adrian was reasonable. The State points out that the conditions outside were “very cold” and “very windy,” the sidewalk had not been shoveled, and the streets were “kind of slushy.” This argument is also not disputed by Adrian. *See Fischer v. Wisconsin Patients Comp. Fund*, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (argument asserted by the appellant and not disputed by the respondent may be taken as admitted).

¶10 I read Adrian’s brief as arguing that regardless of the distance and purpose of his transport, the conditions of his transport and the destination would have led a reasonable person in his situation to believe that he or she was under

arrest. Adrian notes the following: (1) four officers were present at the scene of his traffic stop, which Adrian characterizes as an “unusually large police presence”; (2) it is reasonable to conclude that Adrian was not informed of his right to remain on the scene and perform his field sobriety test; (3) Officer Welte conducted a pat-down search of Adrian’s person prior to moving him; (4) the squad car in which Adrian was transported was locked; (5) Adrian was separated from his keys and wallet; (6) the sally port to which Adrian was transported was not in public view; and (7) Adrian was moved to a “confined, law enforcement location.”

¶11 I do not agree that the totality of these facts combined would lead a reasonable person to believe that he was arrested. While Adrian might have felt that he was not free to leave, that is not the test of whether he was in custody to the degree associated with an arrest. See *State v. Martin*, 2012 WI 96, ¶74, 343 Wis. 2d 278, 816 N.W.2d 270. A person who is seized in a *Terry* stop might not believe he or she is free to leave, however, the person is not necessarily under arrest. *Id.*

¶12 First, Officer Welte explained that the presence of additional officers was not unusual in light of: the weather conditions at the time, the fact that the stop occurred near where other officers were patrolling and that in that situation, officers tend to stop by to offer assistance; and the need for officers to sit with Adrian’s vehicle and provide assistance if need be to Adrian’s passenger. Adrian has not cited this court to any evidence or legal authority which would lead this court to conclude otherwise. Second, Adrian’s argument that it is reasonable to assume that he was not informed of his right to remain on the scene to perform his field sobriety tests is purely speculative. There is nothing in the record to support this assumption. Third, any restraint of Adrian’s freedom during the pat-down

search of Adrian's person or during the brief transport itself, while increasing the intrusiveness of the stop, was justified. Officer Welte explained that it is standard procedure to place individuals in the back seat of the squad car, regardless of the circumstances. Furthermore, as previously observed by this court, "[c]ommon sense dictates that safety concerns for both the officer and the public would justify the use of handcuffs" during the transport of a suspect when an officer "is [] not able to maintain surveillance over a passenger." *State v. Krahn*, No. 2009AP2406, unpublished slip op. ¶10 n.3 (WI App Feb. 3, 2010). The same can be said for conducting a brief, nonintrusive search of a passenger and partially restricting a passenger's movements inside the vehicle, without the usage of handcuffs. Fourth, the fact that Adrian did not have his wallet and keys with him does not indicate in this case that he was illegally arrested. There is no evidence that Officer Welte took control of those items and kept them from Adrian, and even assuming that he did, there is no indication that Welte did so past the point reasonably justified by the stop. *See generally State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639. Finally, in *Quartana*, the court considered that the defendant in that case was not transferred to a more institutional setting, like a police station. *Quartana*, 213 Wis. 2d at 450. However, the location is but one factor to be considered in the totality of the circumstances.

¶13 Here, Officer Welte testified that he informed Adrian that Adrian was being transported to the police station to perform the field sobriety test and that if and when Adrian passed the test, Adrian would be transported back to his vehicle. *See, e.g., State v. Marten-Hoye*, 2008 WI App 19, 307 Wis. 2d 671, 746 N.W.2d 498 (concluding that a reasonable person would consider themselves under arrest where defendant was informed that she would be issued a citation and then would be free to leave). It is undisputed that Adrian was transported within

the “vicinity” of the traffic stop and that the weather and road conditions reasonably justified moving Adrian. I conclude that in this case, the conditions of the transport, when considered in light of the totality of the circumstances, did not transform the temporary seizure into an arrest. Accordingly, I reverse the circuit court’s order granting Adrian’s motion to suppress.

*By the Court.*—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

